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मामला क्रमांक ..... **सन्** 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

CRIMINAL APPEAL NO.625/2004

APPELLANT (In Jail) — Kishan @ Kisaan, S/o Sumit Ram, Caste- Uraon, aged 20 years, resident of Village Gersa, Police Chowki- Lundra, P.S.- Dhaurpur, Distt. Surguja (CG)

Vs

RESPONDENT — State of Chhattisgarh, Through: P.S.- Dhaurpur, Distt. Surguja (C.G.)

Present:
Mr. Bhupendra Singh, Advocate for the appellant.
Mr. Arun Sao, Government Advocate for the respondent-State.

ORAL JUDGMENT

(15th November, 2007)

Per Dhirendra Mishra, J:

This criminal appeal is directed against the judgment of conviction and order of sentence dated 30.6.2004 passed in Sessions Trial No.284/03 whereby learned 4th Additional Sessions Judge, Ambikapur has convicted the appellant under Sections 363, 366 (a) & 376 of Indian Penal Code (for short 'IPC') and sentenced to undergo R.I. for 5 years and to pay a fine of Rs.200/-, in default of payment of fine to undergo additional R.I. for 2 months; R.I. for 7 years and to pay a fine of Rs.500/-, in default of payment of fine to undergo additional R.I. for 5 months & R.I. for 10 years and to pay a fine of Rs.1,000/-, in default of payment of fine to undergo additional R.I. for 6 months respectively. All the sentences have been directed to run concurrently.

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -2-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

Case of the prosecution, in brief, is that on 6.7.2003 the prosecutrix lodged a report in the Police Outpost Lundra alleging that on 30.6.2003 in the evening at about 7.00 p.m. she had gone to attend the call of nature with her younger brother Kailash, while she was returning home the appellant and Manbodh caught her and dragged her to a distance of one kilometer, where the appellant committed rape with her and thereafter took her to Bargidih on the promise of marriage and there again committed rape with her. In the meanwhile, the appellant took her to various places and ultimately kept her at Village Radhapur in his sister's house for three days. However, she was rescued by her uncle Basantlal, who brought her back to home and thereafter she lodged the report of Ex.P-4. On the basis of this report crime was registered in the Police Station Dhaurpur on 7.7.2003 vide Ex.P-11.

During investigation, the prosecutrix was sent for medical examination to the Primary Health Centre, Dhaurpur where Dr. Smt. Rajni Mandavi (PW-8) examined her and gave her medico-legal report of Ex.P-5. The prosecutrix was also sent for ossification test to the District Hospital, Ambikapur where Dr. M.K. Jain (PW-14) conducted ossification test and gave his report of Ex.P-12. Her mark sheet of Primary School Examination of Class-V was taken into possession vide Ex.P-9 in which her date of birth is mentioned as 1.7.1990.

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —3—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

After completing investigation, the charge sheet was filed. During investigation, the prosecution examined 16 witnesses in all and thereafter statement of the accused was recorded under Section 313 of the Cr.P.C. in which he denied the evidence available against him in the prosecution case and stated that the parents of the prosecutrix were pressurizing him to marry the prosecutrix, however, he refused, therefore, he has been implicated in a false case. He has further stated that the prosecutrix used to go to work with him.

Learned Additional Sessions Judge after hearing learned counsel for the respective parties, convicted and sentenced the appellant as mentioned in Para-1 of this judgment.

Learned counsel for the appellant submits that from perusal of the statement of prosecutrix and from the conduct of prosecutrix it is manifestly clear that the prosecutrix was the consenting party. She has categorically stated that she visited various places with the appellant and did not raise alarm or tried to escape, on the other hand there is evidence that the appellant and the prosecutrix together went to work. He further argued that the prosecution has failed to prove that the prosecutrix was minor by leading cogent and reliable evidence. Kotwari register pertaining to the prosecutrix has not been produced and proved during trial, which is primary evidence of the age. Even the mark sheet has not been proved by examining the Head Master of the school. So

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

far as the ossification test is concerned, the age assessed on basis of such examination is not conclusive and there is possibility of variation of 2-3 years in either side and therefore, it cannot be said that the prosecutrix was less than 18 years of age on the date of offence.

On the other hand, learned counsel for the State supporting the impugned judgment has contended that the version of the prosecutrix is duly corroborated by the statement of Kailash (PW-2) & Budhsai (PW-5), who have seen the appellant taking the prosecutrix on the date of incident. It was further argued that the report of the radiologist regarding the age of prosecutrix is further confirmed from the entry in the mark sheet where the date of birth of the prosecutrix is shown as 1.7.1990 and as the date of offence is 30.6.2003, the age of the prosecutrix on the basis of ossification test as also on the basis of mark sheet is 13 years and taking into consideration the age of the prosecutrix, the consent of the prosecutrix is immaterial.

I have heard learned counsel for the parties. I have perused the impugned judgment as also the evidence available on record.

To establish the age of the prosecutrix, the prosecution has examined Dr. M.K. Jain (PW-14), who has proved the report of Ex.P-12 and stated that he examined the prosecutrix on 14.7.2003 and on the basis of X-ray report her age has been assessed by him between 13-14 years. In the cross-examination he has stated that there is possibility

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -5-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

of variation of two years on either side. This report is based on the Indian table given in Dr. Modi's Jurisprudence.

The trial court in Paragraph 11 of the impugned judgment, after considering the opinion of the Radiologist and also taking into consideration the date of birth given in the mark sheet, has arrived at the conclusion that age of the prosecutrix was less than 18 years on the date of incident, which appears to be just and proper.

The prosecution has examined the prosecutrix as PW-1, who has stated in her deposition that on the date of incident while she was returning after easing-out in the evening, one Manbodh caught her on the way and thereafter the appellant caught her and committed rape with her. He took her to Bargidih and went to the house of some Krishna and thereafter both of them went to Berpota on foot and from Berpota they went to Ambikapur. From the statement of this witness it is seen that the prosecutrix accompanied the appellant to various places and had frequent sexual intercourse with him. She was spotted by her uncle Basantlal (PW-7), who caught her at Village Radhapur and thereafter she returned with him to her home and narrated about the incident.

After going through the statement of this witness it appears that the prosecutrix accompanied the appellant to her own free will.

Budhsai (PW-5) has stated that on the date of incident at about 6.00 p.m. he saw that the appellant had caught the prosecutrix, Manbodh

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

also accompanied him. The prosecutrix was trying to free herself, however, he took her towards Kalpu's house. However, in the cross-examination this witness has admitted that he is uncle of the prosecutrix and did not make any efforts to rescue her niece. Similar is the statement of Kailash (PW-2) who has stated that accused eloped with the prosecutrix.

The trial court considering the age of the prosecutrix that she was only 13 years of age at the time of incident has negated the defence of the consent taken by the appellant with an observation that looking to the age of the prosecutrix the consent, if any, is meaningless. Version of the prosecutrix that she was raped by the appellant is also corroborated from the statement of Dr. Rajni Mandavi (PW-8), who has proved the medico-legal report of Ex.P-5 and deposed that hymen of the prosecutrix was ruptured, on inserting two fingers the prosecutrix complained pain, there was an abrasion between minor and majora of the prosecutrix of size 5cm x 1cm and she has opined that the prosecutrix was subjected to sexual intercourse.

Thus, in view of the evidence of the prosecutrix, which is duly corroborated from the statement of Dr. Rajni Mandavi (PW-8), the conviction of the appellant recorded by the trial court under Sections 363, 366(a) & 376 of the IPC cannot be faulted.

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

At this stage, learned counsel for the appellant submits that the appellant is a young boy of 20 years and considering the circumstances under which the offence alleged to have been occurred, the punishment of R.I. for 10 years under Section 376 of IPC is too excessive and the same deserves to be suitably reduced.

Taking into consideration the totality of circumstances, the age of the appellant and also considering overall evidence available on record, I am of the considered opinion that ends of justice will be served if while maintaining the conviction of appellant under the aforesaid sections, the sentence imposed upon the appellant under Section 376 of IPC is reduced.

In the result, the appeal is partly allowed and while maintaining the conviction of the appellant under Section 376 of IPC, the sentence imposed upon him under Section 376 of IPC is hereby reduced and instead of R.I. for 10 years and to pay a fine of Rs.1,000/-, in default of payment of fine to undergo additional R.I. for 6 months, the appellant is sentenced to undergo R.I. for 7 years and to pay a fine of Rs.1,000/-, in default of payment of fine to undergo additional R.I. for 6 months.

However, conviction of the appellant under Sections 363 & 366 (A) of IPC and sentences imposed under those sections are hereby maintained.

Certified copy as per rules.

Sd/-
DHIRENDRA MISHRA
Judge